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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

GEO. H. SHEPPARD, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Petitioners

vs.

ORVILLE S. CARPENTER,
Respondent.

SUPPORTING BRIEF OF AUTHORITIES AND ARGUMENT ANNEXED TO PETITION OF PETITIONERS.

To The Honorable The Supreme Court of the United States:

Preliminary: The petitioners herein annex to their petition the following supporting brief of authorities and argument, in pursuance of the privilege conferred in Section 2 of Rule 38 promulgated

by the court, reserving to themselves, if permissible, the right hereafter timely to file a more complete brief should the petition be granted.

The question presented for the Court's consideration is shown in subdivision 1 of the petition. A concise statement of the grounds on which the jurisdiction of the court is invoked is shown in the petition at subdivisions II and III thereof.

It is thought a sufficient statement of the case appears at subdivision V of the petition.

Parties—interest: At the threshold of a consideration of the case there arises the question of parties—petitioners.

We are not unmindful of that wholesome rule that courts of justice do not sit to decide or pass upon abstract questions of law or right, but their function (ordinarily) is to protect rights and redress wrongs. If the petitioners have no justiciable interest in the matter presented, the proceeding is at an end for, "not a law alone but a law and its incidence are necessary to a justiciable right or injury."—*Clark* v. *Kansas City*, 176 U. S. 114, 44 Law Ed. 392.

Neither are we unmindful of the fact that this Court has in many cases decided that a petitioner who does not have such justiciable interest in the subject matter of the proceeding asserts that right on behalf of another, whether that other actually has or does not have such right.

Such holding was made in each of the following cases:

Caffrey v. *Oklahoma*, 177 U. S. 346, 55 Law Ed. 799, relator as County Clerk of Oklahoma County sought a writ on the theory that the taxpayers of the county were threatened with injury in violation of a constitutional right.

City of Lampasas v. *Bell*, 180 U. S. 276, 45 Law Ed. 527, involved the right of the City of Lampasas to invoke a constitutional right in favor of the taxpayers of such city, and this Court, in dismissing the writ of error, said:

> "To permit it to come here directly from the Circuit Court would make a precedent which would be to the destruction of the statute. We repeat, the questions which can be raised under any of the subdivisions of Section 5 of the Act must be real, the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked."

Smith v. *Indiana*, 191 U. S. 138, 48 Law Ed. 125, involved a county auditor who sought error to a state court, and this Court, in dismissing the writ, said:

> "It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. * * * We think the interest of an appellant in this court should be a personal, and not an official, inter-

> est, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision."

In *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 52 Law Ed. 450, Mr. Justice Brewer said:

> "Again, that the act of the state is charged to be in violation of the National Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of the state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state court sustaining the act and the interest must be of a personal, and not of an official nature."

These cases are not all, but they are typical of that line of decisions announcing the unquestioned doctrine that altruistic willingness of a petitioner will not confer upon him the right to invoke a legal remedy on behalf of one who has been injured through a violation of his constitutional rights, where the petitioner himself has sustained no legal injury, and especially of the supposed rule that *official* interest of a petitioner is not enough.

If the present case can not be distinguished from such cases, it must fail for want of a justiciable interest in the petitioners.

Candor compels us to say that is perhaps the most

doubtful question involved in the case. But equal good faith will permit us to say that we believe this case is distinguishable from those cited and others of the kind.

In the nature of sovereignty, no state can have a general agent. Yet, in the nature of sovereignty, the state being a legal entity only, must act in every instance through human agencies or other instrumentalities.

The State of Texas is not nominally a party to this proceeding, but in the essence of things, it is a real party at interest. The real substance of the suit—the res—is a sum of money representing the salary of the respondent claimed as a state officer from the 19th day of September, 1940, to the 30th day of September, 1940, inclusive, which sum could only be paid, and has been ordered by the Supreme Court of Texas to be paid out of the State treasury from funds constitutionally belonging to the State of Texas, and which can only be paid under constitutional limitations through the instrumentality of officers or personal agents such as the relators.

The gist of the contention we are trying to make is, of course, that under the facts of this case the petitioners are not mere volunteers in assuming to invoke constitutional protection of the fund, on the contrary they are the constitutionally designated representatives of the State itself with respect to the payment out of its public funds, and they therefore occupy a status with respect to the State of

Texas akin to that of an *alter ego.* In the mandamus suit lying at the bottom of this proceeding, these petitioners in legal effect stand in the shoes of the State of Texas, and the situation is precisely the same as if the State of Texas itself were presenting this petition for certiorari to the judgment of the Supreme Court. Indeed, abundant decisions of the Supreme Court of this State establish the doctrine under our State jurisprudence that such a suit is in legal effect one involving the State, and where such officers are plaintiff they are not required to execute bonds or give other security for costs on appeal and the like. Where they are made defendants it is only because of the legislative authority to institute such suit, the same being considered one against the State. Articles 1733 and 1735 of our Revised Civil Statutes attest this law of the State.

The following decisions further will verify what we have said with respect to the real parties at interest in such suits, to-wit:

Pertinent to the established law of Texas with respect to parties in suits involving the public funds of the State of Texas, we call this Court's attention to *Terrell, Comptroller,* v. *Middleton,* 187 S. W. 367, commonly known in Texas as the "Governor's Chicken Salad" case, wherein it is held that a taxpayer in the State may institute and maintain a suit respecting the unlawful expenditure of public funds. In such a case, however, his justiciable interest does not rest upon the same solid basis as that of the State. It is only an equitable one, whereas, the in-

terest of the State held through its lawful custodian is the real title.

It would be an anomalous thing to hold that an individual taxpayer in Texas, whose right in the subject matter could at best be a mere trifle—will be allowed to institute and prosecute such a suit, and at the same time to hold that the State of Texas whose interest is the real title to the entire extent of public funds in possession of its Treasurer, and who in the nature of things can only act in circumstances such as are involved here through the instrumentality of the very State officials now knocking at the door of this Court. Such a holding, we respectfully submit, would not be in keeping with the common understanding, and moreover would not be in keeping with soundly considered juristic principles.

In *Buchanan* v. *Alexander*, 4 How. 20, 11 Law Ed. 857, it was held that governmental funds in the hands of a purser were nevertheless governmental funds, and not liable to attachment by a creditor of seamen to whom the money was destined to be paid, the court saying:

> "The important question is, when does the money in the hands of the purser, though due to the seamen for wages, become attachable. A purser, it would seem, cannot in this respect, be distinguished from any other disbursing agent of the Government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done

> as regards the pay of our officers and men of the Army and of the Navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service."

The facts of that case are not identical with those of the present case, to be sure, but the wholesome principle announced in the opinion supports the distinction we have sought to make. The words thus fitly spoken are "like apples of gold in pictures of silver."

The rule is illustrated in the many cases involving the liquidation of insolvent estates with respect to priorities in favor of the United States. It is the substance of the situation and not its form that controls the very right of the government.

If a Federal question is here involved—and that only this Court can finally decide—it would seem that petitioners as the sole representatives of the State, and as actual custodians of the funds sought to be taken from them, are preeminently the proper persons to urge that question. To deny them this right would permit a juridical debacle that is unjustifiable. They would be thus compelled to pay from State public funds the salary of a State civil officer for a supposed service he never performed, for a time when he conceivably could have been in the Philippines in

the active discharge of his military duties, under the statute that expressly forbids him to "hold or exercise any civil office." (Sec. 576, Title 10, U. S. C. A.)

Under the holding of the Texas Supreme Court, and under the undisputed facts, respondent has vacated his State office in virtue of the statute above cited, and that without judicial determination perforce of the act of the Congress itself.

Perhaps *Coleman* v. *Miller*, 307 U. S. 433, 83 Law Ed. 1385, is the most luminous discussion of the question of parties petitioner to be found in the decisions. That case holds that members of a State Senate may rightfully invoke the jurisdiction of the Supreme Court to review on certiorari a decision of the State Supreme Court with respect to a Federal question drawn into the case. The case is valuable not only for the point actually decided but likewise for the general discussion illustrative of the character of interest that would make eligible a petitioner to raise the Federal question involved in his petition. The case further has unusual value because of its citation and approval of *Boynton* v. *Hutchinson Gas Co.*, 291 U. S. 656, 78 Law Ed. 1048, as to which this court has said, "Because of its importance, and contrary to our usual practice, the court directed oral argument on the question whether certiorari should be granted and after that argument, upon mature deliberation, granted the writ." We invite the court to consider this case in its entirety as, we know it will, and especially do we call attention to the following language therein:

> "This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question. In none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any 'private damage.'"

There is, therefore, no hard and fast rule that an official interest only is not the interest required to obtain review. It is at last—as it always has been and ought always to be—one of discretion for this Court, having in mind the substance and not the form of the qualifying interest of the petitioner. Every taxpayer, and even every person whether taxpayer or not in the State has an interest of a kind in the subject matter of this suit; but the petitioners have a peculiar and substantial interest in this particular suit beyond that of any other individual. Moreover, as State officers, they have the means (through representation by the Attorney General) of presenting and prosecuting such complaint not possessed by private citizens. Yet another consideration accentuates the peculiar interest of these petitioners in the Federal question involved, it is this: The petitioners in their official capacities are charged with the legal duty—under heavy sanctions —of safeguarding, and accounting for the State public funds. Can it be denied the right of safeguarding and safekeeping in correlation to this duty?

If a thief were to break through to steal, the rat-a-tat-tat of a machine gun would be lawful. Can it be that the more peaceful appeal to the Court for a writ should be denied?

Form of Raising Federal Question. There appears to be no precise form for raising the question of involvement of a Federal question. The language of the jurisdictional statute is broad and significant. It is enough that the Federal question is "drawn in question"—in any fair way.

The matter of sufficiency is always and finally for the Supreme Court. (*Lovell* v. *City of Griffin*, 303 U. S. 404, 82 L. Ed. 949; *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 80 Law Ed. 961; *Carter* v. *Texas*, 177 U. S. 442, 44 Law Ed. 839).

Question Necessarily Passed on Below: If the Federal question necessarily has been decided, it of course has been "drawn in question," and that is enough for jurisdictional purposes. (*Whitney* v. *People*, 274, U. S. 357, 71 Law Ed. 1095; *Furman* v. *Nichol*, 8 Wall. 44, 19 Law Ed. 370).

These petitioners, we respectfully submit, directly raised the Federal questions relied on in this application; (See Pet. par. VI) but whether so or not, it would seem a Federal question was necessarily drawn in the case when the State court considered the Constitution of Texas as amended in 1932 with respect to National Guards, and such question was necessarily decided when it held that the amendments finally

determine the controversy in favor of the respondent Carpenter. This is true for two reasons; first, if the Texas amendment is a literal warrant for the officer's dual office holding, it is void as being in contravention of Section 576 Title 10 of the United States Code, declaring that "No officer of the army on the active list shall hold any civil office whether by election or appointment." The two laws can not stand at the same time. One must fall and of course that one is the State law. The Federal law is supreme and all courts must know this and respect that supremacy.

In the second place, the decision of the State court expressly is put upon the ground that the status of the officer as a member of the National Guard was not changed upon his being inducted into the active service of the Government but abides with him, whereas the Act of the Congress expressly declares:

> "All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective states, * * * so long as they shall remain in the active military service of the United States. * * *
>
> "Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status." (Sec. 81, Title 32, U. S. C. A.)

If the amendment of the Texas Constitution in this respect fixed the status of respondent Carpen-

ter after September 19, 1940, when he became an officer in the active service of the United States, it, and the holding of the Supreme Court of Texas as well, violate the National Guard Act above quoted. Both can not stand as the law upon the subject, and of course, the Federal Act is the supreme law governing.

Necessarily the State court could not have decided these questions as it did without deciding the effect or lack of effect of the Federal Acts here being urged as applicable and controlling.

Erie Railroad v. *Purdy*, 185, U. S. 148, 46 Law Ed. 847; *Williams* v. *Keys*, (Fla.) 186 So. 250; Montgomery v. *Hernandez*, (U. S.) 12 Wheat, 129, and the many other cases cited in Annotation to Section 344, n. 49, Title 28, U. S. C. A.)

Question discussed by the Lower Court: In the nature of things where the State court discusses the Federal question the same is "drawn in question" for jurisdictional purposes. (*Whitfield* v. *Ohio*, 297 U. S. 431, 80 Law Ed. 778; *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Com.*, 297 U. S. 471, 30 Law Ed. 810; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 74 Law Ed. 926).

The State court expressly recognized that the Federal questions here being consdiered were before it and actually discussed them in its opinion on rehearing in the following language:

"The Attorney General in substance contends in his motion for rehearing that this Court erroneously held in its original opinion that the calling of relator to service as a member of the National Guard of the United States did not result in his vacating the civil office held by him in this State, and that such holding violates certain provisions of the law passed by Congress. The Attorney General contends that the following Federal statute upholds his contention that relator has vacated his State office by assuming the status of an officer in the United States Army under the conditions shown by this record:

" 'No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated.' Title 10, Section 576, U. S. C. A.

"Furthermore, in support of this contention the Attorney General strongly relies upon the following cases, among others: *United States ex rel. Gillett* v. *Dern, Secretary of War, et al.*, 74 F. (2d) 485, and *Thomas L. Fekete, Jr.* v. *City of East St. Louis*, 315, Ill. 58, 145 N. E. 692, 40 A. L. R. 650.

"The provisions of the statute above quoted do not, either directly or by implication, sustain the contention of the Attorney General. If it should be held that this relator occupies the status of an 'officer of the Army on the active list,' and that the State office he now holds is a 'civil office,' both within the

meaning of the above statute—a question we do not decide, but leave to the Federal authorities to decide —still such statute makes no provision that an officer included within its terms vacates his civil office." (R. pp. 92-93)

Professing not to decide the federal question of vacating the civil office by section 576, the Court actually has assumed to decide that very question.

Federal Question Raised First Time on Rehearing: The Federal questions herein presented were raised more specifically perhaps in the motion of these petitioners for a rehearing in the State Supreme Court than previously. This, we understand is sufficient, where, as here, the questions were actually considered and decided as shown by the record. The rule that such belated presentation is not sufficient has no application to such a case. The purpose of a timely raising of the Federal question has been subserved. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 Law Ed. 360.

Extent of the Right of Petitioners to Complain: We most respectfully submit that if any Federal question is presented and if these petitioners have the necessary interest in the subject matter to present error at all, then they may present and have determined every ground that makes the judgment or decree of the State court violative of the Federal law, whatever that ground of decision may be. In other words, the injury to these petitioners—the unlawful deprivation of the possession of the public funds—

is identically the same whatever the nature, source and extent of the error underlying the decision, if that *decision* involves any "title, right, privilege, or immunity" within the scope of Section 344 (b) Title 28 United States Code Annotated.

The necessary "incidence" is present when there has been rendered a judgment or decree denying the petitioners a title, right, privilege or immunity claimed under the Federal Constitution, statutes or laws. Thus the holding of the State court in misconstruing the State Constitution in such way as to make it violative the Federal law is no more to be excused than if it had made its decision in the absence of a State constitution or statute.

So that, we urge the vice of the *decision* whatever the grounds or *absence* of grounds given therefor by the State court. Explicitly we submit the court's construction of the amendments of Sections 33 and 40 of Article XVI of the State Constitution, wherein it held such amendments to authorize respondent Carpenter, an officer in the National Guard of Texas, to hold and exercise his office of major on the active list of the United States Army after having been ordered into such active service and after he had been duly appointed and qualified for such active official service was and is in violation of the Fourteenth Amendment to the Constitution of the United States in this that such construction of the amended sections, in that they abridge the privileges of citizens of the United States, and deny to persons within

the jurisdiction of the United States the equal protection of the laws.

Specifically these sections amended in 1932, as construed by the Texas Supreme Court, vouchsafe to those persons who had been members of the National Guard of Texas, (such as respondent Carpenter) the privilege thereafter to hold an office on the active list in the army of the United States of America, and at the same time to hold a civil State office in Texas; whereas such privilege of dual office holding is denied to other persons in the State who have been drafted, accepted, or otherwise ordered into active service in the United States Army, and who may have been commissioned to an office in the army.

This is not the equal protection of the laws to the citizens of the United States who reside in Texas.

If the Constitution of Texas as amended is thus in violation of the Fourteenth Amendment, it is void and the decision of the State court has denied these petitioners titles, rights, privileges and immunities under Federal laws.

If we are correct in our contention that respondent has the status of that of an officer of the United States Army, and not that of a National Guardsman, as held by our Supreme Court, then it follows that he vacated his civil office on becoming an officer in the United States Army, under the plain provisions of Section 12 of Article XVI of the Texas Constitution, as interpreted by the Court of Criminal

Appeals, a court of last resort, of this State, in the case of *Lowe* v. *State*, 201 S. W. 986, from which we quote:

> "It seems that when one accepts an incompatible office with the one he holds he has the right of election to abandon one of them (Cyc. vol. 23, p. 518; Webb v. Reynolds (Civ. App.) 160 S. W. 153), but that, when an officer of the state accepts an office of profit in the military service of the United States, his tenure as judge ceases by virtue of the constitutional provision contained in Article 16, Section 12, supra."

Moreover, we think, if the attempted amendment of 1932 is *void* it did not operate to change in any way Section 33 of Article XVI, which itself expressly forbids payment of salary to a dual office holder such as is involved here.

Grounds for Decision other than Federal Question: We understand the established rule to be that where the decision of the State court is based upon a valid State law entirely sufficeint within itself to support the decision, the Supreme Court will not interpose a writ. But if such State law itself be in violation of Federal law the court will be quick to hear the case.

In *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 Law Ed. 510, it is said:

> "* * * But, being under duty to make an independent study of the question, we have done so. That study leaves us in grave doubt whether the lower court has correctly interpreted the

intention of the law makers. On the other hand, we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution. As a general rule it is no less true with reference to State than to Federal legislation that this Court will not decide an issue of constitutionality if the case may justly and reasonably be decided upon a construction of the statute under which the act is clearly constitutional. Compare Bratton v. Chandler, 260 U. S. 110, 114, 67 L. Ed. 157, 161, 43 S. Ct. 43; South Utah Mines & Smelters v. Beaver County, 262 U. S. 325, 331, 67 L. Ed. 1004, 1007, 43 S. Ct. 577; Hopkins v. Southern California Teleph. Co., 275 U. S. 393, 403, 72 L. Ed. 329, 337, 48 S. Ct. 180. But where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the Federal Constitution, and where the proper construction of the statute is a matter of grave doubt, this Court will rest its decision on the Constitution, and will not undertake to decide the question of construction as to which it lacks the power to give a definitive answer."

See also: *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 80 Law Ed. 961.

Evasion of Decision of Federal Question: If the Federal question be actually "drawn in" the case, the State Court may not by evasion of decision forestall Federal review. The disposition of the matter is not so easy as that. (*Broad River Power Co.* v. *State*, 281 U. S. 537, 74 Law Ed. 1023; *McCoy* v. *Shaw*, 277 U. S. 302, 72 Law Ed. 891.)

The Federal questions were affirmatively raised, we think, but if mistaken in that, we submit the court considered, discussed and necessarily decided them, even if there has been no intentional evasion of decision.

Illustrative Cases thought to be Pertinent: We beg to submit the following authorities which are thought to be pertinent to the principal questions presented. For convenience sake, we have made parenthetical quotations or comments to show the pertinence of the case.

Coleman et al v. Miller, Secretary of State, 307 U. S. 433, 83 Law Ed. 1385. (This case has been cited by us under the subject of parties in the beginning of this brief of argument.)

Ex parte Caplis, 275 Fed. 980, ("The record from the Adjutant General's office shows that this form 1014, embodying the order referred to, was mailed to each of the petitioners on March 19, 1918, and addressed to Taylor Town, La., being the address given by petitioners when they registered. At the time of issuance and mailing of this order, both petitioners had long since fled the country. Neither has been discharged from the military service, if either can be said to be or to have been in the military service. *If they are soldiers, their status as civilians must have been changed by some law of the United States.")*

Blackington v. U. S., 248 Fed. 124, ("In this case it appears that the appellant is now a soldier in the United States Army, having been

drafted into that service pursuant to Section 111 of the National Defense Act of June 3, 1916, (39 Stat. 166, 211), and of Section 1, Subd. 2, of the National Conscription Act of May 18, 1917, on August 5, 1917, at which time he was examined by the Federal medical officers and accepted into said United States service, and said examination is not shown to have been in manner irregular or unfair. *In view of the above, we are of opinion that his present status as a soldier is determined by the draft of August 5, 1917.")*

Ex parte Dostal, 243 Fed. 664, ("These cases fully sustain the views above expressed touching upon the force and effect of the National Defense Act and of the Selective Draft Law. They are authority for the proposition that a member of the National Guard becomes a part of the military force of the United States from the date of the draft order. They are also authority to sustain the power of Congress and the President thus to draft compulsorily into the service of the United States all officers and enlisted men of the National Guard. The power to raise, organize, and equip armies, and to provide for the common defense, conferred by the Constitution (Article 1, Sec. 8 cls. 10, 11, 12, 13, 14, 15 and 17; Section 10 cl. (3) is practically unlimited.")

Harvard Law Review, Vol. LIV No. 2, p. 201, ("Moreover, every officer and enlisted man of the National Guard was required to take a dual oath—to support the Nation as well as the State, to obey not only the Governor but also the President. This was required to implement the draft provision, Section 1111, under which, whenever

Congress authorized the President the use of troops in excess of the regular forces, the President might draft into Federal service the members of the National Guard, and the National Guard Reserve. All persons so drafted stood discharged from the militia and were liable to service for the duration of the war.")

Opinion Acting Judge Advocate General Ansell to the Chief of the Militia Bureau of the United States of date October 22, 1917, ("There is, then no such thing as drafting the National Guard into the Federal service as such; only its members as individual citizens are drafted. The National Guard * * * is not drafted. There is no connection in the eyes of the law between the status which an individual occupies as a member of the National Guard, and the status which he occupies after he has been drafted into the service of the United States. * * * ")

Fekete v. City of East Saint Louis (Ill.) 145 N. E., 692, 40 A. L. R. 650, ("It is clear plaintiff was not, after his appointment as captain in the United States Army, a member of the Illinois National Guard.")

Ex parte Dailey, (Tex. Crim. Rep.) 246 S. W. 991, 26 A. L. R. 138, "Where the term 'civil officer' is employed, it is shown it is meant to exclude an officer of the militia. We are of opinion that a reading of the entire Title and the various chapters of the Revised Civil Statutes relative to the National Guard makes it clear that an officer of that body is a 'military' and not a 'civil officer,' and therefore are constrained to hold that, under the wording of Section 40, Article XVI of our Constitution while

Honorable Horton B. Porter at the same time he was District Judge of the 66th Judicial District, was also holding a commission as Captain of Company L, 143d Infantry in the National Guard, he was not holding two civil offices."

Home Insurance Co. v. Dick (U. S.) 74 Law Ed. 926, ("That the Federal questions were not raised in the trial court is immaterial. For the Court of Civil Appeals and the Supreme Court of the State considered the questions as properly raised in the appellate proceedings and passed on them adversely to the Federal claim. Chicago R. I. & P. Ry. Co. v. Perry, 259 U. S. 548, 551, 66 Law Ed. 1056, 1058, 42 Sup. Ct. Rep. 524; Sully v. American National Bank, 178 U. S. 289, 298, 44 Law Ed. 1072, 1076, 20 Sup. Ct. Rep. 935. The case is properly here on appeal.")

Milsaps College v. Jackson, 275 U. S. 129, 72 Law Ed. 196, ("While in cases like this 'we form our own judgment as to the existence and construction of the alleged contract, and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration and it will in general be followed, unless it seems to be plainly erroneous.' Also, we think, the rule as to the construction of statutes of exemption from taxation should be applied, and where there is room for reasonable doubt as to total or only partial exemption, the latter alone should be recognized. Great weight attaches to the decision of a state court regarding questions of taxation or exemption therefrom under the Constitution or laws of its own state.")

Mathews v. McStea, 20 Wall. 646, 22 Law Ed. 448, ("We are of opinion that the only question made and decided in this case against plaintiff in error, was the sufficiency of the acts of the President to inaugurate a war which would render invalid this contract, and that this is one of the questions embraced by the Act of February 5, 1867. The motion to dismiss is therefore overruled.")

Fiske v. State of Kansas, 274 U. S. 380, 47 Sup. Ct. Rep. 665, ("A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under Section 237 of the Judicial Code.")

Nutt v. Knut, 200 U. S. 13, 26 Sup. Ct. Rep. 216, ("A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of § 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved.")

Boyd v. State of Nebraska, 143 U. S. 135, 12 Sup. Ct. Rep. 375, ("Arrival at this conclusion

(as to citizenship) involved the denial of a right or privilege under the Constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not, depended, and jurisdiction to review a decision against such right or privilege necessarily exists in this tribunal.")

Summation of Federal Questions Involved: The State Supreme Court held that the amendment of Sections 33 and 40 of Article XVI of the Constitution excepted respondent from the prohibition against dual office holding. Those claimed exemption clauses are as follows:

"* * * Provided, that the restriction as to the drawing and paying of warrants upon the treasury shall not apply to officers of the National Guard of Texas. * * *"—Sec. 33.

"* * * Provided, that nothing in this Constitution shall be construed to prohibit an officer or enlisted man of the National Guard, * * * from holding in conjunction with such office any other office or position of honor, trust or profit, under this State or the United States. * * *"—Sec. 40.

As thus construed these amendments involve, and the court's decision compasses the following Federal questions:

1. The status of an officer on the active list of the United States Army, as defined by the Congress. (Sec. 81, Title 32, U. S. C. A.)

2. The singleness of office holding by officers on the active list of the United States Army as declared by the Congress. (Sec. 576, Title 10, U. S. C. A.)

3. The exclusive power of the Congress to provide for the common defense; (Const. Art. 1, Sec. 8, cl. 1) to make rules for the government and regulation of the land * * * forces; (Ibid, cl. 14) to provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States; (Ibid, cl. 16) and

4. The abridgment of the privileges and immunities of citizens of the United States, and the denial to persons within the jurisdiction of the United States of the equal protection of the laws. (14th Amend. Sec. 1)

The holding of the Supreme Court of Texas operates to deny to petitioners the titles, rights, privileges and immunities vouchsafed to them by the above-mentioned constitutional provisions and statutes.

Final Word. We all know that the office of major in the National army in active service and a state civil office are incompatible. It is as true in government as well as in religion that no man can serve two masters.

No man is elected or appointed to a civil office except it be contemplated he will serve the State—exercise the office. No man will be conscripted or

inducted into an office in the active service of the army except that he is needed and will exercise the office.

The State of Texas through the Constitution has, as petitioners believe, forbidden such dual office-holding, and likewise the United States, it is believed, has forbidden such dual office-holding—such divided allegiance.

The only effective remedy of the State was, of course, the forfeiture of the State office for a violation of the Constitution—it has no jurisdiction with respect to the military office.

On the other hand, the United States Congress having full power so to do has declared that, "No officer of the Army on the active list shall hold any civil office * * *," and there being no lack of power to make its fiat binding, it follows, we submit, the effect of Section 576 is to vacate any civil office which the occupant may hold upon his becoming an officer on the active list in the army. If he "*shall not hold*" such civil office he *does not hold* it under such express inhibition. This statute when interpreted properly means that such army officer shall not hold any civil office, and to that end any attempt by him to do so shall be futile—that is, the status of civil officer shall not exist. The latter part of the section is not mandatory but directory, and a proper interpretation of the statute—that is, to effect the purpose of the Congress—would require such interpretation to the end that the army officers should be manned at

all events. The law commands, and conclusively presumes a surrender of the civil office. The civil office being thus vacated, these petitioners as public officials—fiduciaries of the treasury funds in their hands—have no authority to pay the salary claimed by respondent.

Respectfully submitted,

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